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No. 84-1890

IN THE
Supreme Court of the United States
October Term, 1984

CARDINAL RESOURCES, INCORPORATED,

Petitioner,

vs.

EDDIE STEAMSHIP COMPANY, LTD., THE OCEAN-US MUTUAL UNDERWRITING ASSOCIATION (BERMUDA), LTD., M/V PANAMAX STAR, IN REM, CRESCENT TOWING & SALVAGE CO., INC., AND T. SMITH & SON, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CRESCENT TOWING & SALVAGE CO., INC. AND T. SMITH & SON, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the well established rule of *Robins Drydock & Repair Company v. Flint*, 275 U.S. 303 (1927), bars recovery of a party who has allegedly suffered economic damages but no physical injury?

INTERESTED PARTIES

1. Crescent Towing & Salvage Co., Inc.
   Defendant
2. T. Smith, & Son, Inc.
   Defendant
3. Courtenay, Forstall, Grace & Hebert
   Attorneys for Defendants,
   Crescent Towing & Salvage Co., Inc. and
   T. Smith & Son, Inc.
4. Cardinal Resources, Inc.
   Plaintiff
5. Breazeale, Sachse & Wilson
   Attorneys for Plaintiff
6. Eddie Steamship Co., Ltd.
   Defendant
7. The Oceanus Mutual Underwriting Association
   (Bermuda), Ltd.
   Defendant
8. Farris, Ellis, Cutrone & Gilmore
   Attorneys for Defendants,
   Eddie Steamship Co., Ltd. and
   the Oceanus Mutual Underwriting
   Association (Bermuda), Ltd.

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DESIGNATION OF CORPORATE RELATIONSHIPS

Crescent Towing & Salvage Company, Inc. and T. Smith & Son, Inc. filing this Brief in Opposition to Petition for Certiorari as Respondent in this proceeding, state that:

This is its original Designation of Corporate Relationships.

Since this litigation has begun, T. Smith & Son, Inc., of which Crescent Towing & Salvage Company, Inc. was a subsidiary, has merged with Cooper Stevedoring Company, Inc., resulting in the formation of a new corporation, Cooper/T. Smith Corporation. Cooper/T. Smith Corporation is the parent corporation of both Crescent Towing & Salvage Co., Inc. and T. Smith & Son, Inc.

Crescent Towing & Salvage Company, Inc. and T. Smith & Son, Inc. do not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries).

The only affiliates of Crescent Towing & Salvage Co., Inc. and T. Smith & Son, Inc. are St. John Stevedoring Company, Inc. and Paco Terminals, Inc.

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Crescent Towing & Salvage Company, Inc. and T. Smith & Son, Inc. (respondents), oppose the petition for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit rendered on March 5, 1985.

OPINIONS BELOW

The unreported opinion of the United States District Court for the Eastern District of Louisiana, dismissing petitioner's claim on a motion for summary judgment, is

reproduced in the Appendix of the Petition for Writ of Certiorari filed by the petitioner, Cardinal Resources, Inc. The per curiam opinion of the United States Fifth Circuit Court of Appeals, affirming the District Court's dismissal, is not reported, but is reproduced in the Appendix of the Petition for Writ of Certiorari filed by the petitioner.

JURISDICTION

The judgment rendered by the United States Fifth Circuit Court of Appeals was entered March 5, 1985. The petition for certiorari was filed by Cardinal Resources, Inc. on June 3, 1985. This brief in opposition to the petition for certiorari was filed within 30 days after receipt of the petition for certiorari. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On December 18, 1981, the M/V PANAMAX STAR attempted to dock at facilities of International Marine Terminals' (hereinafter "IMT") located on the Mississippi River below New Orleans. The vessel contacted the IMT dock and facility, allegedly causing certain physical damages. T. Smith & Son, Inc. and Crescent Towing & Salvage Company, Inc. (hereinafter referred to collectively as "Crescent") are alleged to have provided tug assistance to the M/V PANAMAX STAR at the time. IMT instituted suit against the M/V PANAMAX STAR, her owners and operators, and Crescent seeking recovery for physical damages and for economic loss sustained as a result of the business interruption during the period of repair to the dock. Portions of that litigation are still pending in the district court. Cardinal Resources, Inc.

(hereinafter "Cardinal") instituted litigation (which was ultimately consolidated with the IMT litigation) against the same basic parties, seeking recovery of damages alleged to have been sustained in absence of physical damages and as a consequence of its not being able to fully utilize the facility during the repairs to the dock.

The IMT facility is a coal loading and unloading dock, having the capacity to transfer coal from barges or ships to other such vessels or to or from coal stockpiles located proximally to the dock to such vessels. IMT maintains these stockpile areas where various coal owners are provided with storage area for their coal.

At the pertinent times, petitioner Cardinal contracted with IMT to load, transfer and store its coal. Seven or eight other coal companies had similar contracts with IMT, and presumably IMT would transfer cargo on behalf of any paying customer and the use of the dock was not by exclusive contract with any company(ies). The transfer agreement of Cardinal called for certain minimum and maximum tonnages, set a transfer price on a per ton basis and allocated liability between the parties, among other provisions. In its suit, Cardinal specially claims that because portions of the dock were unusable during repairs it was forced to transfer its stockpile of coal by a more expensive procedure and was forced to sell it at a lower rate. Cardinal contends that, since the conveyor from pad to ship was not operable, Cardinal was forced to load from pad to barges to smaller vessels (mid-stream) and as a result sustained certain economic losses. Importantly, Cardinal was able, as its own decision and discretion, notwithstanding the casualty, to remove its coal stored on IMT's premises. Cardinal and its coal did not

sustain any physical damages as a result of the incident described above. Furthermore, Cardinal has no proprietary or ownership interest in the IMT facility. Its claim for such economic damages is based purely on an alleged inability of Cardinal to take full advantage of the use of the dock during the period of repair.

Crescent, relying on *Robins Dry Dock & Repair Company v. Flint*, 275 U.S. 303 (1927), brought a motion for summary judgment in the trial court. Upon considering all the evidence then available, based on *Robins*, the District Court dismissed Cardinal's complaint. Cardinal appealed the District Court's judgment to the United States Fifth Circuit Court of Appeals. The case was argued before a three judge panel who affirmed the judgment of the District Court in a per curiam opinion.

REASONS FOR DENYING THE WRIT

I. There Is No Need For This Court To Act Because The Circuits Are Not Rendering Conflicting Decisions But Are Following This Court's Decision In Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

Robins has remained the law of the United States for over fifty-seven years. Simply because the legal principles espoused in that decision were set forth years ago, this, by itself, cannot constitute just cause to overturn such a venerable Supreme Court doctrine. The district and circuit courts have had no trouble understanding its clear meaning and applying its holdings. Its application was then, and is now, based upon sound legal judgment and, as it must be, it has been applied, where applicable,

uniformly throughout the United States, thus promoting consistency in the Federal Maritime Law area.

Given the factual setting in the present case, for petitioner to argue that a vessel owner's liability depends upon the geography of the Federal Circuits is tantamount to stating that the Circuits are ignoring this Court's decision in *Robins*. This is simply not true. Since *Robins* has not been overruled by this Court, the Circuits are bound by precedent to follow *Robins*. The jurisprudence from the Circuits shows that the Circuits are ruling in accordance with this Court's decision in *Robins*. After reviewing *Robins* and its progeny, one court recently stated that "there is no indication that the Supreme Court has moved away from the rule in *Robins*, nor that the Courts have strayed from its application." *Matter of Williamson Leasing Company, Inc.*, 577 F.Supp. 890, 892 (E.D. Mo. 1984). Therefore, it would be futile for this Court to resolve a non-existent conflict between the Circuits concerning the law established by *Robins*.

Writing for the Court in *Robins*, Justice Holmes stated the general rule that "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. . . . The law does not spread its protection so far." 275 U.S. at 309, (citation omitted). The Circuits have followed this rule, generally interpreting it as disallowing the recovery for a party with economic losses not associated with physical damages. *Akron Corp. v. M/T CANTIGNY*, 706 F.2d 151, *reh'g denied*, 711 F.2d 1054 (5th Cir. 1983); *Kingston Shipping Co., Inc. v. Roberts*, 667 F.2d 34 (11th Cir. 1982) (per curiam), *cert. denied* 458

U.S. 1108 (1982). The concepts initiated by *Robins* are so firmly entrenched in our law that they are reflected by the Restatement Second of Torts in §766B:

> "1. Except as stated in sub-section (2) [concerning the negligent failure to transmit a telegraph message], and in the case of bodily harm to a servant, there is no liability for pecuniary harm caused by:
>
> (a) Negligent interference with the performance of a contract, or
>
> (b) Negligently causing a third person not to enter into or continue a business or other advantageous relation with another."

The Fifth Circuit has recently affirmed its commitment to *Robins* in *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc). In following *Robins*, the Court stated that "we are unpersuaded that we ought to drop physical damages to a proprietary interest as a prerequisite to recovery for economic loss." *Id.* at 1021. Further, the *Testbank* dissent conceded that "If *Robins* establishes a policy of restricting the type of plaintiff who can recover for a defendant's negligence, physical property damage furnishes an easily discernible boundary between recovery and nonrecovery." *Id.* at 1045 (Wisdom, J., dissenting). The Eleventh Circuit has also expressed its commitment to *Robins* in *Kingston Shipping*, 667 F.2d 34, and *Hercules Carriers, Inc. v. State of Florida*, 720 F.2d 1201 (11th Cir. 1983) *aff'd on rehearing*, 729 F.2d 1359 (11th Cir. 1984) (en banc), *cert. denied* — U.S. — (1984). In *Kingston Shipping*, the Court denied recovery for economic losses not associated with physical damages to claimant/vessel owners who had been delayed due to a collision between

two vessels not owned by the claimants. The *Kingston* Court found the rule of *Robins* to be applicable in denying the claimants' recovery. *Kingston Shipping,* 667 F.2d at 35. The *Hercules* Court relied on *Kingston* in denying recovery of economic losses due to a vessel's negligence in colliding with a bridge. *Hercules Carriers,* 720 F.2d at 1202. These recent Eleventh Circuit decisions exemplify that Circuit's adherence to the *Robins* rule.

J. Ray McDermott & Company v. S.S. EGERO, 453 F.2d 1202 (5th Cir. 1972) is cited by petitioner as a case showing the Fifth Circuit's dissatisfaction with *Robins.* The plaintiff in *EGERO* was allowed to recover certain delay damages for a negligent interference with a contract. However, the Court recognized *Robins* but distinguished it from the factual situation in *EGERO.* The *EGERO* plaintiff was contractually bound to pay delay damages while the defendant's negligent interference delayed plaintiff's performance. The Court allowed plaintiff to recover the specific contractually related damages, but added that if the plaintiff's claim had been for lost profits, *Robins* would have prevented recovery. 453 F.2d at 1204. To argue that this decision shows the Fifth Circuit's dissatisfaction with the *Robins* decision is to fail to see how the Court distinguished *Robins* on its facts. The Fifth Circuit complies with the other Circuits and their application of the *Robins* rule.

The Fourth Circuit follows the *Robins* rule as well. In *Venore Transportation Company v. M/V STRUMA,* 583 F.2d 708 (4th Cir. 1978), the Court distinguished *Robins* and allowed the plaintiff to recover charter hire. However, *Robins* was cited, and the Court stated that "there is no inconsistency in our holding and that of the

Supreme Court in *Robins Dry Dock.*" *Id.* at 711. Also, in *Rederi A/B Soya v. Evergreen Marine Corp.*, 1973 A.M.C. 538 (4th Cir. 1972), the Court affirmed the District Court's reliance on *Robins* in disallowing economic losses. The per curiam appellate court specifically stated that *Robins* was binding upon them. *Id.* at 538.

The Second Circuit's position concerning the *Robins* rule is also in accordance with the other Circuits. In *Federal Commerce & Nav. Co. v. M/V MARATHONIAN*, 528 F.2d 907 (2nd Cir. 1975) (per curiam), *cert. denied* 425 U.S. 975 (1976), the Court affirmed the District Court's denial of pecuniary damages as the result of a third party's alleged negligent interference with the performance of a contract. The District Court held that "*Robins* correctly reflects the present state of law concerning negligent interference with a contract." 392 F.Supp. at 911. The Fourth Circuit panel, in affirming the reliance on *Robins*, added that "we are unable, however, to discern any indication that the Supreme Court has moved away from the *Robins* rule." 528 F.2d at 908. The *MARATHONIAN* decision came after *Petition of Kinsman Transit Company*, 388 F.2d 821 (2nd Cir. 1968), in which the Court denied plaintiff's claim for purely economic damages. The *Kinsman* Court acknowledged *Robins*, but for unassigned reasons, relied on another method of legal analysis to deny economic damages (which, interestingly enough, is the same result that would have been obtained had *Robins* been used in the analysis). These Second Circuit decisions show its concurrence with the other Circuits.

Courts in other Circuits adhere to the *Robins* rule of denying recovery for economic loss for no corresponding

physical damage and for negligent but unintentional interference with a contract. *See, e.g. Hayes v. Luckenbach SS Company,* 92 F.Supp. 684 (D. Mass. 1950); *Getty Refining & Marketing Company v. M/T FADI B,* 595 F.Supp. 452 (E.D. Penn. 1984); *Petition of S.C. Loveland Company,* 170 F.Supp. 786 (E.D. Penn. 1959); *Complaint of Great Lakes Towing Company,* 395 F.Supp. 810 (N.D. Ohio 1974); *Matter of Williamson Leasing Company, Inc.,* 577 F.Supp. 890 (E.D. Mo. 1984). These decisions from the First, Third, Sixth and Eighth Circuits demonstrate the Circuits' reliance on the "bright line" of *Robins* and clearly show the lack of conflict between the Circuits on the *Robins* issue.

Petitioner relates that "exceptions" to the *Robins* rule have been noted by the Circuit Courts. However, these are also "bright line" rationally based decisions which are factually distinguishable from *Robins* and the instant case. The First, Fourth, Fifth and Ninth Circuits have noted distinctions where commercial fishermen could recover from the defendant who has negligently caused water pollution to occur. *Burgess v. M/V TAMANO,* 370 F.Supp. 247 (S.D. Me. 1973), *aff'd per curiam,* 559 F.2d 1200 (1st Cir. 1977); *Pruitt v. Allied Chemical Corp.,* 523 F.Supp. 975 (E.D. Va. 1981); *State of Louisiana ex rel Guste v. M/V TESTBANK,* 752 F.2d 1019; *Union Oil Company v. Oppen,* 501 F.2d 558 (9th Cir. 1974). The *Pruitt* court also allowed boat, tackle and bait shop, and marina owners to recover damages for the pollution, but only as "surrogate plaintiffs" for the fishermen who would not seek legal redress. *Pruitt,* 523 F.Supp. at 980. However, each of these exceptions involved water pollution which totally prevented the fishermen from performing their occupation. This distinction cannot rationally

be extended to the present case, nor should it be. Petitioner, an owner of coal having control over its distribution, was able to continue its commercial operation, and actually sold and shipped the coal while the dock was being repaired. Therefore, petitioner does not qualify for an exception from *Robins*. It is interesting to note that the Supreme Court has not yet even ruled on these limited "exceptions" to *Robins*.

The Circuits are in agreement in their application of the *Robins* rule. Damages are unrecoverable for economic losses without physical injury and also for negligent but unintentional interference with a contract. The only limited exception allowed is where a party is totally prevented from performing its operations (as in the case of water pollution preventing a commercial fisherman from fishing) and where the one with the economic loss is contractually bound to pay extra due to another's negligence. The fact that the *Robins* decision has been discussed and even criticized and yet has not changed since it was decided over fifty-seven years ago points to the rule's strength, its application, and its importance. Therefore, the Supreme Court should deny the Writ of Certiorari.

II. There Is A Strong Need To Keep The Robins Rule Governing Recovery Of Economic Loss In Maritime Cases.

Without the *Robins* rule to prevent recovery for purely economic losses, the attempted sphere of recovery by potential plaintiffs would be limited only by the broadest reaches of imgination of counsel. The limitation against recovery of a pure economic loss "is a pragmatic one: . . . the indirect economic repercussions of negligence may be

far wider, indeed virtually open-ended." James, *Limitation on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal,* 25 Vand. L.Rev. 43, 45 (1972). To prevent this open-ended liability, Courts have often looked to *Robins.* As the Fifth Circuit has said, "the (*Robins*) rule's purpose is to prevent limitless liability for negligence and the filing of lawsuits of a highly speculative nature." *Akron Corp. v. M/T CANTIGNY,* 706 F.2d at 153.

The limits on liability is a concern that has been addressed several times before. The Supreme Court expressed its concern when it issued the *Robins* decision in 1927. *Robins* was decided ten years after tort liability limits had been extended by Judge Cardozo's shattering of privity in *MacPherson v. Buick Motor Company,* 217 N.Y. 382, 111 N.E. 1050 (1916). The fact that *Robins* was decided after *MacPherson* shows that the Supreme Court was concerned about the limits of liability. The wisdom of the Supreme Court's decision is evidenced by *Robins* still being the law today. In referring to *Robins* in *State of Louisiana ex rel Guste v. M/V TESTBANK,* 752 F.2d 1019, Judge Higginbotham stated:

> "This limit on liability stood against a sea of change in the tort law. Retention of this conspicuous bright line rule in the face of the reforms brought by the increased influence of the school of legal realism is strong testament both to the rule's utility and to the absence of a more 'conceptually pure' substitute."

752 F.2d at 1023. The *Robins* limitation is an obviously important one, and it needs to remain as a limitation.

To allow recovery for purely economic losses would open the overburdened Court system to a flood of litigation and could even sound the death knell to an already

troubled maritime industry. The case by case analysis supported by the petitioner would unnecessarily clog the judicial system and subject maritime interests to defending potential suits hundreds, possibly thousands, of miles away from where a casualty occurs. Petitioner argues that a Court can limit the defendant's losses to those that are directly foreseeable. But once Courts permit recovery for economic loss to parties that are linked in a chain of contracts, defining a stopping point becomes nearly impossible. *State of Louisiana ex rel Guste v. M/V TESTBANK,* 752 F.2d at 1039 (Wisdom, J., dissenting). Obviously, what one who has sustained economic loss remotely related to a casualty would consider foreseeable would differ widely from what an objective, non-involved individual would consider foreseeable. Without a bright line the vast abyss between these two points of view would in every case have to be settled by the Courts. Therefore this Court should deny the Writ of Certiorari and continue to allow *Robins* to stand as a limit on liability for purely economic losses.

—o—

CONCLUSION

The Circuit Courts have followed the Supreme Court's ruling in *Robins Dry Dock & Repair Company v. Flint.* The Circuits are in agreement concerning the application of *Robins,* and have only distinguished but two limited situations. The issues raised in this case are disposed of by *Robins,* and these issues are not sufficiently important for this Court's review.

To allow recovery for economic damages without any physical injury would open the Courts to a flood of litigation. Allowing recovery for economic damages, and thus overruling the *Robins* decision, would end the reign of one of the wisest and oldest maritime jurisprudential rules. Overturning *Robins* would also heavily burden the already weakened maritime industry. This Court should deny the Writ of Certiorari to the Fifth Circuit Court of Appeals.

Respectfully submitted,

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